IN THE COURT OF APPEALS OF IOWA

No. 7-328 / 96-351

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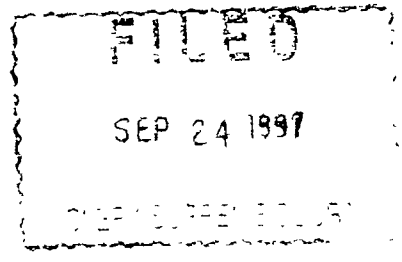
IN RE THE MARRIAGE OF JUDY C. GARLAND AND DENNIS W. GARLAND

Upon the Petition of
JUDY C. GARLAND,

Appellee,

And Concerning,
DENNIS W. GARLAND,

Appellant.



Appeal from the Iowa District Court for Polk County, Larry J. Eisenhauer, Judge.

Dennis Garland appeals from the modification of the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

Rick L. Olson, Des Moines, for appellant.

Steven L. Addington, Des Moines, for appellee.

Considered en banc. Streit, J., takes no part.

PER CURIAM.

Dennis Garland appeals a district court order modifying the parties' dissolution decree by increasing the amount and duration of child support he is obligated to pay for his youngest child, extending the length of time he must pay support for his oldest child beyond the child's eighteenth birthday but while she is still in high school, and establishing child support for the oldest child while she is a full-time student and meets the requirements of Iowa Code section 598.1. Dennis also appeals the order overruling his counter-application, which sought to eliminate the provision requiring him to pay alimony. We affirm as modified.

Dennis and Judy Garland were married on August 29, 1971. They have two children: Abigail, born October 2, 1977, and Sarah, born October 23, 1980. Dennis worked as a repair technician for Xerox. Judy was an elementary school teacher employed by the Des Moines School District. On October 26, 1987, Dennis had a third child, Brent, born to Paula Kohlman (now Paula Garland). Judy signed a dissolution petition the same day.

On September 29, 1988, the court filed its decree dissolving the marriage. The court divided the property of the parties approximately equally, which included an order requiring Dennis to pay Judy one-half of his profit sharing retirement plan. The plan was valued at $39,286 at the time of trial. The court found Judy earned $20,600 and Dennis earned $32,000. The court awarded Judy physical custody of the two children. Taking into account the third child Dennis had with Paula, the court ordered

Dennis to pay child support of $275 per month per child "until the minor children attain the age of eighteen years or graduate from high school, whichever first occurs, marry, or become otherwise emancipated." The court retained jurisdiction regarding child support in the event the children continued their education after high school.

On July 20, 1995, Judy filed a petition to modify the decree. She averred both children would graduate from high school when they were nineteen years old. Judy requested the court require Dennis to continue paying support until the children graduated from high school, to pay support while the children were attending college, and to set the amount of support pursuant to the child support guidelines. In his answer, Dennis admitted the allegations of the petition, but resisted the relief requested and stated the petition did not allege a change of circumstances had occurred. Dennis filed a counter-petition and contended Judy's income had increased to an amount making his continued alimony obligation of $100 per year commencing December 1, 1988, and continuing in that amount for a period of ten years, inequitable.

Trial on the modification petition was held October 12, 1995. By that time, Dennis had married Paula and they had another child. The value of his profit sharing retirement plan had increased to approximately $100,000. His income had increased to between $41,600 and $44,600, while Judy's income had increased to $40,600. Paula was self-employed but had not turned a profit on her business. Neither Judy nor Dennis have any plans to leave their present employers.

Abigail intends to attend college and earn a pharmacy degree, which will take six years. She has visited the campuses of Drake University, Creighton University, and the University of Iowa. Judy submitted materials indicating costs to attend the University of Iowa would be approximately $9500 per year.

The court set Dennis's child support obligation for Sarah at $537.20 per month, and ordered the support to continue until Sarah turned eighteen or graduated from high school, whichever occurred later. The court ordered Dennis to pay $275 per month as support for Abigail so long as she was a full-time student and met the requirements of Iowa Code section 598.1. The court ordered the support for Abigail retroactive to the date of filing of the petition. The court did not address Dennis's counter-petition to eliminate alimony, and then denied the request after Dennis filed a rule 179(b) motion.

Our review of the trial court's decision on the modification petition is de novo. *In re Marriage of Lee,* 486 N.W.2d 302, 304 (Iowa 1992). The trial court's findings of fact are entitled to weight, but they are not binding upon us. *In re Marriage of Kunkel,* 555 N.W.2d 250, 253 (Iowa App. 1996) (citing Iowa R. App. P. 14(f)(7)).

I. Support for Sarah

In setting support for Sarah, the court stated in its decree that it had applied the child support guidelines. The court ordered the support to continue until Sarah's eighteenth birthday or graduation from high school, whichever occurred later. The original decree provided support for Sarah would continue until she turned eighteen

or graduated from high school, whichever occurred first. The evidence showed Sarah will turn eighteen before she graduates from high school, so the support will continue until she graduates from high school. Dennis argues the trial court only retained jurisdiction to modify child support for education after high school, and no showing of any substantial change in circumstances was made to justify modifying the decree to extend support beyond Sarah's eighteenth birthday while in high school.

Dennis filed a rule 179(b) motion notifying the court his counsel failed to include his two children with Paula as additional qualified dependents. He submitted a revised guidelines worksheet and requested the court set monthly child support at $509.23. We believe the trial court should have granted the 179(b) motion to the extent that there was evidence in the record to support Dennis's contention that he was entitled to an additional allowance under the guidelines for two qualified dependents from his marriage to Paula. As explained later in this opinion, we modify the decree fixing $509.23 as the support for Sarah.

Under Iowa law, child support must cease when a child reaches the age of eighteen unless the evidence establishes that one of the statutory provisions applies. *In re Marriage of Byall*, 353 N.W.2d 103, 107 (Iowa App. 1984). The court may order either parent to pay an amount reasonable and necessary for supporting a child. Iowa Code § 598.21(4)(a) (1995). Support may include "support for a child who is between the ages of eighteen and twenty-two years who is regularly attending an accredited school in pursuance of a course of study leading to a high school diploma

or its equivalent." *Id.* § 598.1(6). Under these statutory provisions, the court had the authority to order child support to continue past Sarah's eighteenth birthday. A substantial change in circumstances was shown by the increase in Dennis's income. *See id.* § 598.21(9) (providing a substantial change in circumstances exists when the amount of support varies by ten percent or more from the amount that would be due pursuant to the most current child support guidelines).

Dennis is entitled to a reduction in monthly income for purposes of applying the child support guidelines because the guidelines allow for a qualified additional dependent deduction. The monthly deduction for qualified dependents is $142 for two children. Iowa Code § 598.21 (child support guidelines). Recalculating the amount of net income after including the qualified additional dependent deduction, we apply the guidelines and modify the amount of child support for Sarah to $509.23.

II. Support of Abigail

Dennis renews his durational argument by asserting the court could not order support for Abigail past her eighteenth birthday while she was in high school. We have already resolved this issue in regard to Sarah, and affirm in regard to Abigail. Dennis argues the court did not have authority to order support because no evidence showed Abigail had been admitted to a college or university and the court did not have sufficient information to determine an appropriate amount of support for Abigail. Dennis argues the court could only order the support retroactive to the date of service, not the date of filing.

Dennis argues the text of Iowa Code section 598.1(6) only allows the court to order support for a child who is a full-time student or has been accepted for admission to a college or university. We rejected such a strict reading of the statute in *In re Marriage of Richards*, 439 N.W.2d 876, 879 (Iowa App. 1989), where we held an order may be made before the children reach eighteen or are accepted into an accredited school provided the order is conditioned upon the children meeting the requirements of Iowa Code section 598.1(2) [now section 598.1(6)]. The modification order in this case provided Dennis would pay support "so long as [Abigail] is a full-time student and meets the requirements of Iowa Code section 598.1." Under *Richards*, Dennis's argument is without merit. Moreover, the order is not premature, as Abigail has already turned eighteen. *See Richards*, 439 N.W.2d at 879 (holding order not premature when oldest child was seventeen years old at time of trial and distinguishing case where order was made nine years before any child would be attending college).

The child support guidelines are inapplicable to determine support for an unmarried adult child under twenty-two years of age who is a student. *In re Marriage of Linberg*, 462 N.W.2d 698, 701 (Iowa App. 1990). The court's task is to set an amount reasonable and necessary for supporting the child. Iowa Code § 598.21(4)(a). To determine whether an amount of support is reasonable, we must

examine the parents' financial resources and the child's educational needs.[1] *In re Marriage of Lieberman*, 426 N.W.2d 683, 685 (Iowa App. 1988). To reach a just and equitable determination of the level of support, we consider the age of the parents, present earning capacity, future prospects, amount of resources the parents own, the duration of the marriage, each parent's level of debt, and any other relevant factors. *In re Marriage of Byall*, 353 N.W.2d 103, 107 (Iowa App. 1984).

This was a sixteen-year marriage during which both parents continued to work for the employers they worked for at the time their marriage was dissolved. Dennis testified he has no intention of leaving his employer, and both parents appear to have strong job security. Through their efforts, they have earned increased compensation and both earn salaries in the low $40,000 range. Dennis's profit sharing retirement plan is now worth approximately $100,000 and he has automobiles not necessary for his transportation worth $15,000. Abigail has been too busy with school activities to work regularly and any income she earns is expended for transportation costs. Abigail will spend six years studying for her degree, and it is appropriate to require Dennis to contribute toward her expenses over part of this time as allowed by statute.[2]

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[1] During the course of the trial, Dennis testified he thought he should pay an amount equal to one-third of his daughter's college expenses.

[2] This case was tried prior to the 1997 enactment of House File 612, which provides, "The amount paid by each parent shall not exceed thirty-three and one-third percent of the total cost of postsecondary education." Act effective July 1, 1997, sec. 190, H.F. 612 (to be codified at Iowa Code § 598.21(5A)(a)(3)).

The district court ordered support for Abigail retroactive to the date of filing of the petition for modification. Iowa Code section 598.21(8) provides judgements for child support or child support awards pursuant to chapter 598 may be modified retroactively only from the date the notice of the pending petition for modification is served on the opposing party. Iowa Code § 598.21(8). We modify the order to provide support for Abigail is retroactive only to the date of service.

III. Alimony

On our review of the record, we find Dennis has not shown a substantial change in circumstances not within the contemplation of the district court when the alimony obligation was created.

Costs on appeal are taxed one-half to Dennis and one-half to Judy.

AFFIRMED AS MODIFIED.